

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42071

OTTER TAIL POWER COMPANY
v.
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Decided: December 13, 2004

This decision instructs both parties to file supplemental evidence so we will have a full record upon which to analyze the traffic group issues that have been raised in this case.

Overview

In this proceeding, Otter Tail Power Company (Otter Tail) has challenged the reasonableness of the rates charged by The Burlington Northern and Santa Fe Railway Company (BNSF) to haul coal from the Powder River Basin (PRB) of Wyoming to the Big Stone Generating Station (Big Stone) located near Milbank, SD. Extensive evidence has been submitted under the stand-alone cost (SAC) test set forth in Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (Guidelines), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987). The SAC test seeks to determine the lowest cost at which a hypothetical, optimally efficient carrier—the stand-alone railroad (SARR)—could provide service to the complaining shipper, and to selected additional traffic that would use the same lines and facilities, if the rail industry were free of barriers to entry or exit. Guidelines, 1 I.C.C.2d at 528.

The parties sharply disagree on what traffic is appropriate to include in the traffic group used in the SAC analysis, and each has submitted a proposed operating plan for the SARR that adheres to its view of what traffic would be handled by the SARR. Otter Tail's supplemental operating plan for the SARR was designed to serve approximately 233 million tons of traffic in the base year, while BNSF's was designed to serve only 135 million tons. This large difference in traffic stems from two critical traffic-selection issues on which the parties are diametrically opposed. Otter Tail's evidence includes, while BNSF's excludes, 13.7 million tons of rerouted non-coal traffic on the northern portion of the SARR and 85 million tons of coal traffic traveling south from southern PRB mines. In so doing, the parties have presented us with an incomplete record. If we should determine that we do not agree with

the entire position of either party, we may be left without the evidence needed to complete our SAC analysis. Alternatively, if we agree in principle with one party's position, we would be left with evidence that has not been tested through the adversarial process. Either way, the manner in which the parties have presented their evidence will have frustrated our regulatory review process.

We need not be confined to the parties' evidentiary choices. When necessary to fulfill our responsibilities, we may seek additional evidence from the parties, so that we will have an adequate record upon which to decide the case. Towards that end, the parties are directed to submit supplemental evidence containing an operating plan designed to serve the traffic group advocated by its opponent.

These two critical traffic-group issues, and the relevant Board precedent, are discussed below.

Rerouted Northern Non-Coal Traffic

Otter Tail included in its traffic group 13.7 million tons of non-coal traffic rerouted from the route actually used by BNSF to a longer route between Snowden and Fargo, ND. In Texas Mun. Power Agency v. Burlington N. & S.F. Ry., STB Docket No. 42056 (STB served Mar. 24, 2003) (TMPA), the Board announced general principles to guide the analysis of rerouted traffic. The Board refined its analysis in Duke Energy Corp. v. CSX Trans., Inc., STB Docket No. 42070 (STB served Feb. 4, 2004) (Duke/CSXT) at 16, where it set forth a rebuttal presumption against rerouting cross-over traffic when the reroute is longer than the actual route used by the railroad, with the greater the disparity in distance, the stronger the presumption. And the Board explained that, if the cross-over traffic shares no facilities with the issue traffic movement, complainant must present "a compelling justification that the defendant carrier should itself be routing the traffic in this manner and that it is inefficient for it not to do so." Id. at 16-17. BNSF challenges Otter Tail's inclusion of rerouted northern non-coal traffic under both the TMPA and Duke/CSXT tests. Otter Tail is directed to file supplemental evidence showing the effect if the disputed rerouted northern non-coal traffic were excluded from its traffic group.

Southbound Southern PRB Coal Traffic

Otter Tail also included in its traffic group approximately 85 million tons of coal movements originating from PRB mines south of Cordero and traveling south to Converse Yard, where the SARR would end and the traffic would be interchanged to the residual BNSF. BNSF argues that this traffic should be excluded because it does not share facilities with Otter Tail's traffic, and BNSF's proposed operating plan does not provide for this disputed traffic. However, as the Board explained in Duke/CSXT, at 23-24, even if disputed traffic would pay for facilities it does not use, it is unclear that the correct remedy would be to exclude the traffic entirely. Therefore, BNSF is directed to file

supplemental evidence showing the effect if the disputed southbound coal traffic originating south of Cordero were included in the traffic group.

A related issue that has been raised regarding inclusion of this southbound coal traffic from the southern PRB is whether including this traffic would create an impermissible cross-subsidy of the infrastructure that would be needed north of Converse Junction. Both parties are directed to address how we might assure that any rate prescription resulting from the SAC analysis would not reflect an impermissible cross-subsidy. See PPL Montana, LLC v. Burlington N. & S.F. Ry., STB Docket No. 42054 (STB served Aug. 20, 2002) at 10-13.

Instructions

The parties should submit their supplemental evidence within 45 days of this decision, and each party may submit a reply to the other party's supplemental evidence within 20 days thereafter. If it wishes, Otter Tail may submit its evidence based on the Rail Traffic Controller model used by BNSF, in lieu of its string model.

The parties' supplemental submissions must be confined to the two issues discussed here: the impact on the SAC analysis of including or excluding the two categories of disputed traffic mentioned above, and how to assure that no cross-subsidy would be created by including the southbound southern PRB coal traffic. The parties may not use the supplemental submissions as an opportunity to address other issues in this case (such as the unit costs used by the parties to estimate the total operating expenses and road property investment or the appropriate way to allocate revenue from cross-over movements).

This decision does not restrict the parties' opportunity to present, in the subsequent (not yet scheduled) briefing and oral argument, their arguments as to the appropriate traffic group to be used in this case.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The parties are directed to submit the supplemental evidence set forth in this decision. The supplement evidence of both parties is due January 27, 2005, and replies are due February 16, 2005.

2. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary